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QUESTION OF THE VIOLATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN ANY PART OF THE WORLD

CIVIL AND POLITICAL RIGHTS

EFFECTIVE FUNCTIONING OF HUMAN RIGHTS MECHANISMS: ADAPTATION AND STRENGTHENING OF THE UNITED NATIONS MACHINERY FOR HUMAN RIGHTS

Written statement*/ submitted by the Lawyers Committee for Human Rights, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[28 January 2000]

*/ This written statement is issued, unedited, as received from the submitting non-governmental organization(s).

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Justice in Malaysia:
the Case of the Special Rapporteur on the Independence of Judges and Lawyers; and the Prosecution of the Political Opposition, Lawyers and Journalists

1. The Lawyers Committee for Human Rights remains concerned about the administration of justice in Malaysia. For over ten years, the Lawyers Committee has observed a consistent deterioration in the rule of law. Beginning in 1988, the government replaced many independent-minded judges with those aligned with the ruling coalition, eroding fairness in the courts. Today, the government and several powerful members of the judiciary are attacking lawyers, journalists, and others willing to represent politically unpopular defendants and speak out about human rights. The results of this campaign are seen in two groups of recent cases. First, the handling of the defamation cases against Dato' Param Cumaraswamy, the UN Special Rapporteur on the Independence of Judges and Lawyers. Second, the criminal charges brought against several lawyers and a journalist for activities within their professional duties, and a political dissident. The two groups are dealt with in turn.

Defamation suits against Dato' Param Cumaraswamy, UN Special Rapporteur on the Independence of Judges and Lawyers

2. In August 1995, Dato' Param Cumaraswamy announced that he would investigate allegations of corruption in the Malaysian judiciary. In November 1995 a London-based magazine, *International Commercial Litigation*, published comments by the Special Rapporteur regarding complaints that certain business entities were able to manipulate the Malaysian courts. As a result of these comments, four civil defamation suits claiming some US$100 million in damages were brought by private corporations against Mr. Cumaraswamy. The United Nations Secretary-General certified as to Mr. Cumaraswamy's immunity from these actions pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations ("the Convention"), however the Malaysian courts refused to enforce the Secretary-General's certificate.

3. A difference arose between the Malaysian government and the Secretary-General and the matter was referred to the International Court of Justice ("ICJ") by ECOSOC decision 1998/297 on August 5, 1998. In its near-unanimous advisory opinion of April 29, 1999, the ICJ determined that Malaysia had breached its obligations under the Convention by failing to transmit the Secretary-General's certificate of immunity to the competent Malaysian courts. The ICJ held that the Malaysian government should "communicate [the] advisory opinion to the competent Malaysian courts, *in order that Malaysia's international obligations be given effect and Mr. Cumaraswamy's immunity be respected*" (emphasis added).

4. On July 30, 1999 ECOSOC passed resolution 1999/64 calling on Malaysia "to make further efforts, in order that its international obligations . . . be given effect and Dato' Param Cumaraswamy's immunity be respected." Furthermore, in a letter to the President of ECOSOC on 19 October 1999 (E/1999/121), the UN Secretary-General reiterated Malaysia's obligation to accord Mr. Cumaraswamy immunity. To date the Malaysian courts have refused to implement the ICJ opinion and Mr. Cumaraswamy's claims for immunity continue to be denied. Furthermore, in Prime Minister Mahathir Mohamed's address to the General Assembly on September 29, 1999 (A/54/PV.16), he accused the

United Nations of choosing a biased and unqualified expert in Mr. Param Cumaraswamy, and criticized the UN and the treaty system of immunity.

5. Malaysia's failure to implement the opinion of the ICJ despite express agreement to be bound by the decision; the government's dismissal of calls from ECOSOC to implement the decision; and the recent statement of the Prime Minister of Malaysia to the General Assembly indicate a certain disrespect for the authority of the ICJ, international treaty obligations and the United Nations organs. Specifically, Malaysia's failure to ensure a Special Rapporteur's immunity from legal action while carrying out his mandate weakens the role of Special Rapporteurs, other UN experts and the United Nations machinery for the implementation of human rights.

6. Furthermore, as highlighted in the Secretary General's letter to ECOSOC on December 15, 1999 (E/1999/124), Malaysia's failure to accord Mr. Cumaraswamy his legal immunity creates a considerable tax on the United Nations which is obliged to indemnify Mr Cumaraswamy, as a UN expert, for damages and costs he incurs. So far the United Nations has paid US$110,886.91 in legal expenses on behalf of Mr. Cumaraswamy. Although the United Nations has submitted a claim for reimbursement of those costs to the Malaysian Government no payments have been received. As proceedings continue the legal costs will rise and should Malaysia's courts award damages against Mr. Cumaraswamy, the United Nations may be liable for enormous sums.

Criminal Prosecution of the Political Opposition, Lawyers and Journalists

7. Not only are political opposition figures at risk, but so are the lawyers that defend them and the journalists who report about their treatment before the courts. In recent cases, Malaysian judges have imposed punitive jail sentences on lawyers, journalists, and political dissidents in a series of questionable prosecutions. The cases described below reveal a pattern that transcends characterization as isolated attacks on disfavored individuals. The Malaysian justice system has started to employ a self-protection mechanism that raises serious questions about its independence from the ruling government.

8. *Anwar Ibrahim*: The former Deputy Prime Minister and political rival of Mahathir was deposed from office and charged with multiple counts of official corruption and sodomy. He was convicted in April 1999 of corruption, in a trial, marked by numerous procedural irregularities, that drew international condemnation. He is currently being tried for sodomy, although the trial was suspended during the recent national elections in Malaysia, seemingly to silence Mr. Anwar and remove him from public view during the election period.

9. *Zainur Zakaria*: A member of Mr. Anwar's legal defense team, Mr. Zainur was convicted of contempt of court and sentenced to prison in November 1998 after submitting a motion, backed by evidence, charging that prosecutors sought to fabricate testimony. The contempt sanction was imposed without addressing the merits of Mr. Zainur's motion or his proffered evidence. An appeal is pending and the sentence has been suspended in the interim period.

10. *Karpal Singh*: In January 2000 another member of Anwar's defense team, lawyer Karpal Singh, was arrested on allegations of sedition. Karpal's arrest was based on comments he made in court suggesting that his client may have been poisoned while detained in prison.

Like the comments of Zainur Zakaria (above), these comments were a legitimate element of a defense strategy in the case against Anwar. By charging Mr Karpal with sedition as a result of those comments the Malaysian court is infringing Anwar's right to a vigorous defense and Mr Karpal's obligation to provide those rights.

11. *Tommy Thomas*: Like Mr. Cumaraswamy, lawyer Tommy Thomas was sued for comments about corruption in commercial litigation. Fearful of litigation in Malaysian courts, his insurer insisted on settling the case. When Thomas made an out of court statement that he had not been consulted adequately about the decision to settle, a court held him in contempt and sentenced him to six months in prison.

12. *Murray Hiebert*: Mr. Hiebert, a journalist for the *Far Eastern Economic Review*, was convicted of contempt and sentenced to six weeks jail for "scandalising the court" after publishing an article noting the swiftness a case involving a politically connected plaintiff moved through the courts. Rather than face a lengthy appeal, he spent a month in prison.

13. The misuse of legal process to punish lawyers for their representation of unpopular clients is strictly prohibited by international law. Paragraphs 16, 17, 18 and 20 of the United Nations Basic Principles on the Role of Lawyers prohibit prosecution and other sanctions for actions taken by lawyers in accordance with their professional duties and the United Nations Principles on the Independence of the Judiciary emphasize the importance of a fair and impartial legal process. Both these instruments reinforce and supplement the fundamental human rights of freedom of speech and the right to a fair trial guaranteed by Articles 10, 11 and 19 of the Universal Declaration of Human Rights and Articles 14 and 19 of the International Covenant on Civil and Political Rights.

14. The Lawyers Committee has reported on these disturbing trends with the publication of two reports: *Justice on Trial: Malaysia's Assault on Lawyers* (1999) (www.lchr.org/feature/malaysia/JusticeOnTrial.htm) and *Malaysia: Assault on the Judiciary* (1989) (www.lchr.org/feature/malaysia/AssaultOnJudiciary.htm).

Recommendations

15. The Lawyers Committee calls upon the Commission on Human Rights to urge the Malaysian Government to implement the April 29, 1999 Opinion of the International Court of Justice in order to ensure Dato' Param Cumaraswamy's immunity from the four defamation actions currently pending against him.

16. The Lawyers Committee further calls upon the Commission on Human Rights to urge Malaysia to protect and promote civil and political rights, in particular the right to a fair and impartial hearing and the right to freedom of expression.